

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Bernard Levine, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Corporation Franchise Tax :
under Article 9-A of the Tax Law
for the Years f/y/e 4/30/62,63,64. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Bernard Levine, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard Levine, Inc.
c/o Hahn, Hessen, Margolis & Ryan
350 Fifth Ave.
New York, NY 10001

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
3rd day of October, 1980.

Lutbie Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

October 3, 1980

Bernard Levine, Inc.
c/o Hahn, Hessen, Margolis & Ryan
350 Fifth Ave.
New York, NY 10001

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BERNARD LEVINE, INC.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Franchise Tax on Business Corporations	:	
under Article 9-A of the Tax Law for the Fiscal	:	
Years Ending April 30, 1962, 1963 and 1964.	:	

Petitioner, Bernard Levine, Inc., c/o Hahn, Hessen, Margolis & Ryan, 350 Fifth Avenue, New York, New York 10001, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the fiscal years ending April 30, 1962, 1963 and 1964 (File No. 11677).

Petitioner requested that the matter be submitted to the State Tax Commission for decision on the record as presently constituted, without a formal hearing.

ISSUE

Whether petitioner timely filed claims for refund for the years 1962, 1963 and 1964 based on Federal adjustments of tax liability.

FINDINGS OF FACT

1. On July 16, 1970, petitioner, Bernard Levine, Inc., a bankrupt corporation, filed reports of change in taxable income by U.S. Treasury Department for the fiscal years ending April 30, 1963 and April 30, 1964. A similar report of change in taxable income was filed on July 17, 1970 for the fiscal year ending April 30, 1962. All three reports indicated overassessments which in the aggregate totaled \$1,400.26 and which were apportioned by petitioner as follows: for 1962, \$328.93; for 1963, \$1,055.90; and for 1964, \$15.43.

2. The refunds claimed for 1962, 1963 and 1964 were formally denied by the Corporation Tax Bureau on July 11, 1974 on the grounds that the claims had not been filed in a timely manner. A petition for refund was thereafter timely filed.

3. The aforementioned reports indicated that Federal taxable income had been increased by \$7,000.00 for 1962, \$6,500.00 for 1963 and \$14,662.17 for 1964. The revised Federal taxable income was, in each case, reduced to zero by the application of net operating loss carryback deductions available from subsequent years. The refunds claimed for State purposes are the result of a recomputation which includes both the increases in Federal taxable income and the application of net operating loss deductions.

4. The Internal Revenue Service audited petitioner's 1962, 1963 and 1964 U.S. corporation income tax returns and increased taxable income in each of said years as enumerated in Finding of Fact "3", supra. For the years 1962 and 1963 petitioner received notification of the increases in taxable income on June 21, 1965. The record does not disclose the date of Federal notification with respect to the audit findings which increased taxable income for the year 1964.

5. Subsequent to the 1962, 1963 and 1964 Federal audits, petitioner filed Federal claims for refund for said years on Form 843. These claims for refund, like the New York State claims, included both the increases in taxable income and the net operating loss deductions. Again, the record does not disclose the date of the Federal claims for refund.

6. On November 18, 1966, petitioner was refunded \$3,494.76 by the Internal Revenue Service, which amount represents the refunds as claimed by petitioner for the years 1962 and 1963, less an outstanding liability on petitioner's tax account for the year 1964. The receipt of said refund is evidenced in the Assignee's Final Report dated March 1, 1967, paragraph 9, which states, "That

your petitioners also received tax refund in the sum of \$3,494.76 from the U.S. Treasury Dept."

7. The 1964 Federal refund was allowed per a Notice of Adjustment dated March 8, 1971. A Federal refund check dated January 11, 1972 was returned as undeliverable and a second check was thereafter issued on January 7, 1974.

8. By letter dated April 23, 1970, petitioner's certified public accountant received a reply from the Internal Revenue Service regarding his inquiry "...concerning refunds due the above taxpayer (Herbert Levine, Inc.) for the fiscal years ending April 30, 1962, 1963, 1964". Petitioner contends that this date, April 23, 1970, is to be used as the date of the final Federal notification in determining whether the State refund claims were timely filed pursuant to section 1087(c) of the Tax Law.

CONCLUSIONS OF LAW

A. That section 211.3 of the Tax Law provides in relevant part that where the amount of taxable income of a business corporation for any year is changed by the Commissioner of Internal Revenue, the corporation must report the change within ninety days after the final determination of such change; and further that:

"[t]he allowance of a tentative carryback adjustment based upon a net operating loss carryback...shall be treated as a final determination for purposes of this subdivision."

B. That section 1087(c) of the Tax Law provides in pertinent part that if a business corporation is required, pursuant to section 211.3, to file a report with respect to a federal change, the corporation must file a claim for refund of any resulting overpayment of tax within two years from the time such report was required to be filed with the commission.

C. That for the years 1962 and 1963 the date of Federal notification of audit changes is no later than November 18, 1966 and, therefore, the New York

State claims for refund for 1962 and 1963, filed in July of 1970, are beyond the statute of limitations provided for in section 1087(c) of the Tax Law.

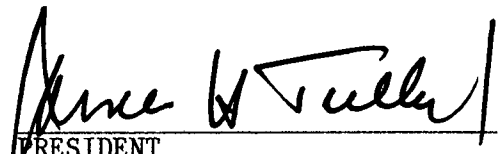
D. That for the year 1964 the date of Federal notification is March 8, 1971. Accordingly, the New York State claim for refund for 1964 is deemed to be timely filed on this date pursuant to section 1087(c) of the Tax Law.

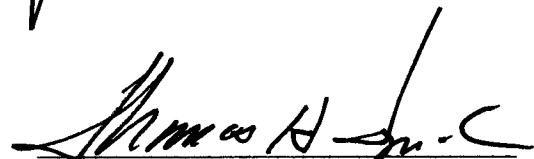
E. That the petition of Bernard Levine, Inc. is granted for the year 1964 and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 03 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER